IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1142

RUBEN MORALES ROBLES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR REHEARING ON DENIAL OF APPLICATION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

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Ruben Morales Robles, Petitioner herein, respectfully moves for rehearing of this Honorable Court's denial of his Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit entered on March 20, 1978.

OPINION BELOW

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 1, 1977. A denial of a timely petition for rehearing was entered on January 13, 1978. Petitioner filed his Application for Certiorari with this Court on or about February 13, 1978, which was denied on March 20, 1978.

AUTHORITY

Petitioner files this Motion for Rehearing pursuant to Rules 58 and 59 of the United States Supreme Court.

The Opinion of the United States Court of Appeals for the Ninth Circuit is attached as Appendix A to Petitioner's Application for Writ of Certiorari previously filed February 13, 1978.

ARGUMENT

This Court should grant the petition in the instant case because:

THE NINTH CIRCUIT HAS RULED ON AN IMPORTANT FEDERAL QUESTION CONCERNING THE RIGHTS OF AN ACCUSED AND THE CONSTRUCTION OF A FEDERAL STATUTE; THIS QUESTION HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In Hensley vs. Municipal Court, 411 U.S. 345, 93 S.Ct. 1571, this Court recognized that the conditions imposed upon a defendant, while released on his own recognizance pending appeal, were sufficiently stringent as to constitute CUSTODY within the habeas corpus statute. 28 U.S.C. 2241 (c)3, 2254 (a). It is submitted that many of the reasons put forth by this Court for finding CUSTODY present under the habeas corpus statute are equally applicable to 18 U.S.C. 3568. As such, 18 U.S.C. 3568 should be applied

to the instant case, and the defendant given some credit against his sentence for the time spent in custody while pursuing his appeal.

In Hensley, supra, this Court found the habeas corpus statute and writ were to be applied only in cases of special urgency; where severe and immediate restraints were put on a person's liberty.

> "The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty . . . [I]ts [the writ's] use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate."

Hensley, supra, at 351.

In determining what made these restraints severe, this Court stated:

> "First he is subject to restraints not shared by the public generally, Jones v. Cunningham, 371 U.S. 236, is, the obligation to appear 'at all times and places as ordered' by 'any court or magistrate of competent jurisdiction.' He cannot come and go as he pleases. His freedom of movement rests in the hands of state judicial officers, who may demand his presence at any time and without a moment's notice. Disobedience is itself a criminal offense. The restraint on his liberty is surely no less severe than the conditions imposed

on the unattached reserve officer whom we held to be 'in custody' in Strait v. Laird, 406 U.S. 341." Hensley, at 351.

It was because of these restrictions on the defendant's liberty that this Court held he was within CUSTODY under 28 U.S.C. 2241. CUSTODY, by its very nature, implies a loss of liberty. A defendant is under the control and at the mercy of the government without the insulating safeguards afforded a person not in CUSTODY. As the instant defendant suffered restraints identical to those in Hensley, he, too, was in CUSTODY.

But the CUSTODY that must be construed by this Court is in 18 U.S.C 3568, not 28 U.S.C. 2241. 18 U.S.C. 3568 reads in pertinent part:

". . . The Attorney General

shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. . . . "

Only three circuits have interpreted 18 U.S.C. 3568 against the backdrop of Hensley v. Municipal Court, supra. United States v. Peterson, 507 F.2d 1191 (D.C. Cir. 1974), Cochran v. United States, 489 F.2d 691 (5th Cir. 1974); Polakoff v. United States, 489 F.2d 727 (5th Cir. 1974); Ortega v. United States, 510 F.2d 412 (10th Cir. 1975). All but one of the circuits, United States v. Peterson, supra, treated the issue summarily, and each found no CUSTODY under 18 U.S.C 3568 unless the defendant were incarcerated. It would seem these

decisions misconstrue the spirit, if not the holding of Hensley. Can a defendant be IN CUSTODY and yet not IN CUSTODY under the laws of the United States Congress? An affirmative answer invokes Humpty Dumpty's rationale in "Alice in Wonderland":

> Humpty Dumpty said in a mournful voice, "When I use a word it means just what I choose it to mean, neither more nor less."
>
> Alice said, "The question is whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "Who is to be the master, that is all!"
>
> Lewis Carroll,
> "Alice in Wonderland"

It would seem that finding the defendant in the instant case not within the contemplated CUSTODY of 18 U.S.C. 3568 would ignore the definition of CUSTODY as set forth in Hensley, supra. It is respectfully submitted that this Court find the defendant within CUSTODY. As such, the defendant should be given some credit against his sentence for the time spent on a highly restrictive appeal bond.

Respectfully submitted,

MICHAEL J. BROWN
222 North Court Avenue
Tucson, Arizona 85701
Attorney for Petitioner

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

I, MICHAEL JOHN BROWN, counsel of record for the petitioner in the above-entitled petition, certify that this petition is presented in good faith and not for purposes of delay. Pursuant to United States Supreme Court Rule 58(2), 28 U.S.C.A., counsel further certifies that this petition is brought on substantial grounds that were available to petitioner although not previously presented. While the grounds submitted in this petition were previously available, they were not presented in the petition for writ of certiorari because at that time counsel thought the instant case should be controlled by North Carolina v. Pearce, 395 U.S. 711 (1969), rather than 18 U.S.C. 3568.

MICHAEL J. BROWN

SUBSCRIBED AND SWORN to before me this 12 day of April, 1978.

NOTARY PUBLIC

My Commission expires:

March 4, 1982

CERTIFICATE OF COUNSEL

Counsel for the petitioner avows that he has deposited in the United States Post Office in Tucson, Arizona, with first class postage prepaid, three copies each of petitioner's Motion for Rehearing to:

UNITED STATES ATTORNEY
District of Arizona
Post Office Box 1951
Tucson, Arizona 85702

and

SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20530

Dated: April 12, 1978

MICHAEL J. BROWN